

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.

No. 3:11-cv-00227-HU

**FINDINGS AND
RECOMMENDATION**

THE TUG SUNDIAL (Vessel ID No.
652357), *in rem*, BARGE 166, *in*
rem, BARGE 71, *in rem*, THE
PIONEER, *in rem*, their apparel,
tackle and appurtenances; BANK
OF AMERICA NA, *in personam*; and
TIDEWATER BARGE LINES, INC., *in*
personam,

Defendants.

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1 HUBEL, Magistrate Judge:

2 In this admiralty case, the United States moves for summary
3 judgment on its second cause of action for strict liability under
4 the Rivers and Harbors Act ("RHA"), 33 U.S.C. §§ 408 and 412,
5 arguing that maritime comparative negligence principles do not
6 apply in allocating the parties' liability under the RHA. The
7 United States also moves for summary judgment on its claim for
8 damages in the amount of \$4,867,320.43, plus prejudgment interest,
9 on the ground that there is no genuine issues of fact as to the
10 costs incurred by the United States to repair the damage caused by
11 the *in rem* vessel defendants to the John Day Dam Navigation Lock.
12 For the reasons set forth below, the United States' motion (Docket
13 No. 89) for summary judgment should be GRANTED in part and DENIED
14 in part.

15 BACKGROUND

16 The United States brought this action against the tug SUNDIAL,
17 the fuel barge PIONEER, grain barges 71 and 166, and their owner,
18 Tidewater Barge Line, Inc., to recover for damage caused to the
19 John Day Navigation Lock on February 28, 2008.

20 In order to assist navigators in properly mooring within the
21 lock chamber, the Army Corps of Engineers has painted two yellow
22 lines in the John Day Navigation Lock's chamber. One yellow line
23 is painted forward of the downstream gate and another is painted
24 25.9 feet downstream of the upstream gate. These lines provide a
25 benchmark for navigators and lock operators as to the vessel's
26 proximity to either gate.

27 The lock has two fill valves and two drain valves. At the
28 time of the incident, it appears that only one fill valve was in

1 use. The fill valve and drain valve cannot be opened at the same
2 time without use of a bypass key. When there is an upstream
3 lockage, as was the case here, the fill valve is not opened until
4 the drain valve is completely closed. The procedure for operating
5 the fill valve is to first open the valve halfway. Once the initial
6 cavitation (e.g., formation and collapse of low-pressure air
7 bubbles that form in the lock as water is introduced into the lock)
8 subsides, the valve is fully opened.

9 There are also two lock stations at the John Day Dam, one
10 located at each of the respective gates. During an upstream
11 lockage, the lock operator opens the downstream gate from the
12 downstream lock station. After the vessel enters the lock, and the
13 vessel operator advises that they are securely tied off to a
14 mooring bitt, the lock operator visually confirms that the stern of
15 the tug is upstream of the downstream yellow line. The lock
16 operator then closes the downstream gate and proceeds to the
17 upstream lock station to confirm that the bow of the leading vessel
18 is downstream of the upstream yellow line and closes the drain
19 valve. When this process is complete, the lock operator begins the
20 filling process from the upstream lock station.

21 On the night of the incident in question, the defendant
22 vessels were transiting upstream on the Columbia River as a
23 flotilla. The flotilla was made up with the SUNDIAL in the stern
24 position as the "pusher" tug in the configuration. The fuel barge
25 PIONEER forward of the tug SUNDIAL, and BARGE 71 and BARGE 166 were
26 tied off side-by-side immediately forward of the PIONEER.

27 Upon receiving a request for an upstream lockage from the
28 SUNDIAL, the control operator at John Day notified the on-duty lock

1 operator, Jerry Boushey. After being informed that the flotilla
2 was secure in the lock, and after confirming that the stern of the
3 SUNDIAL was within the downstream yellow guideline, Mr. Boushey
4 closed the downstream gate and proceeded to the upstream lock
5 station.¹ Upon confirming that the bows of the grain barges were
6 behind the upstream yellow guideline, Mr. Boushey entered the
7 upstream lock station and closed the drain valve. Mr. Boushey then
8 left the lock station for an unspecified amount of time, taking his
9 radio with him, to use the restroom.² When he returned, Mr.
10 Boushey waited for the drain valve to completely close and began
11 the filling process. Once the cavitation had subsided and the fill
12 valve had been fully opened, Mr. Boushey logged onto the computer
13 and began entering data concerning the flotilla into the Army Corps
14 of Engineers' Lock Performance Monitoring System.

15 A few moments later, Mr. Boushey heard a loud "bang" coming
16 from the upstream end of the lock chamber. He looked out the lock
17 station window and saw that the bows of the grain barges were
18 coming up under the upstream gate. Mr. Boushey immediately radioed
19 the SUNDIAL, stating: "SUNDIAL you are under the upstream gate back
20 up!" (Boushey Decl. ¶ 6.) Mr. Boushey also "hit the close button
21 on the fill valve" at that time. (*Id.*) Mr. Boushey immediately
22 radioed the SUNDIAL a second time with a similar warning. (*Id.*)
23 The SUNDIAL's crew responded, indicating it was "trying" to back
24 up, but was unable to do so before the "barges started lifting the
25

26 ¹ Review of the Project Standing Orders confirms that the tug
27 SUNDIAL's crew correctly moored the flotilla within the lock.

28 ² The United States represents that the restroom is located
20 feet from the upstream lock station.

upstream gate, breaking the seal.” (*Id.* ¶¶ 7-8.) The lock flooded soon thereafter.

LEGAL STANDARD

Summary judgment is appropriate “if pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). Summary judgment is not proper if factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. A nonmoving party cannot defeat summary judgment by relying on the allegations in the complaint, or with unsupported conjecture or conclusory statements. *Hernandez v. Spacelabs Medical, Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Thus, summary judgment should be entered against “a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

The court must view the evidence in the light most favorable to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).

1 Where different ultimate inferences may be drawn, summary judgment
2 is inappropriate. *Sankovick v. Life Ins. Co. of N. Am.*, 638 F.2d
3 136, 140 (9th Cir. 1981).

4 However, deference to the nonmoving party has limits. The
5 nonmoving party must set forth "specific facts showing a genuine
6 issue for trial." FED. R. CIV. P. 56(e). The "mere existence of
7 a scintilla of evidence in support of plaintiff's positions [is]
8 insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252
9 (1986). Therefore, where "the record taken as a whole could not
10 lead a rational trier of fact to find for the nonmoving party,
11 there is no genuine issue for trial." *Matsushita Elec. Indus. Co.,
12 Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal
13 quotation marks omitted).

14 DISCUSSION

15 I will first address the United States' motion for summary
16 judgment on its second cause of action for strict liability under
17 §§ 408 and 412 of the RHA.

18 Sections 408 and 412 of the RHA "require, in essence, that the
19 cost of repairing any damage to a work constructed by the United
20 States for the aid of navigation be born by the vessel that caused
21 the damage." *United States v. Republic Marine, Inc.*, 829 F.2d
22 1399, 1405 (7th Cir. 1987). Because these sections have long been
23 understood to establish a standard of strict liability, "the vessel
24 may be held liable without any showing of negligence on its part;
25 the government is only required to establish that the vessel caused
26 the damage." *Id.* at 1406. As the Seventh Circuit went on to
27 explain:

1 Thus if the defendant vessels . . . and the government
2 both acted nonnegligently, Congress has under this strict
3 liability provision placed the liability entirely upon
4 the defendant vessels. Such a conclusion is in accord
5 with the congressional intent to require the barge
6 industry to pay for damage it causes. While in
particular cases the repair costs for such damage will be
disproportionately borne by particular vessels, it can be
assumed that insurance will in general spread such costs
over the industry.

7 *Id.* (internal citations omitted). Courts must still consider,
8 however, whether the government was at fault, and if so, whether
9 the government's negligence was the sole cause of the damage. *Id.*
10 This so-called "sole cause defense," if applicable, places the
11 liability entirely upon the government. *Id.* at 1406-07.³

12 The United States' argument as to why it is entitled to
13 summary judgment on its strict liability claim can be summarized as
14 follows: maritime comparative negligence principles do not apply in
15 allocating the parties' liability in this action under the RHA. As
16 a result, because the SUNDIAL's crew violated a federal regulation
17 promulgated for the purpose of avoiding allisions in the John Day
18 Lock, there is no genuine issue of fact as to whether the *in rem*
19 defendant vessels are *at least* partially at fault, thereby
20 entitling the United States to summary judgment.

21 The federal regulation the United States alleges the SUNDIAL's
22 crew violated is 33 C.F.R. 207.718, which is entitled "Navigation
23 locks and approach channels, Columbia and Snake Rivers, Oreg[on]
24 and Wash[ington]." Section 207.718 provides, in pertinent part,
25 that:

26
27
28 ³ The parties do not dispute the substantive law that applies
on the issue of liability.

1 (k) Mooring in lock. All vessels must be moored within
2 the lock chamber so that no portion of any vessel extends
3 beyond the lines painted on the lock walls. Moorage
4 within the lock chamber will be to floating mooring bits
5 only and will be accomplished in a proper no-slip
6 manner. . . . *The vessel operator will constantly monitor*
7 *the position of his vessel and his mooring bit ties to*
8 *assure that there is no fore or aft movement of his*
9 *vessel and lateral movement is minimized.* Propulsion by
10 vessels within the lock chamber will not be permitted
11 during closure operation of a lock chamber gate or as
12 otherwise directed by the Lock Master.

13 (l) Crew to move craft. During the entire lockage, the
14 vessel operator shall constantly attend the wheelhouse,
15 be aware of the vessel's position, and monitor radio
16 channel 14 on frequency 156.700 MHZ, or otherwise be
17 constantly able to communicate with the Lock Master. At
18 a minimum, vessels shall be as vigilantly manned as if
19 underway.

20 33 C.F.R. § 207.718(k)-(l) (emphasis added).

21 The SUNDIAL's operator, Captain Steven Laremore, has testified
22 that he could not see the mooring bit ties while inside the lock
23 chambers due the flotilla's configuration:

24 Q. On the night of February 28, 2008, the way the
25 barges were made up and tied off with the PIONEER,
26 fuel barge, were you able to see -

27 A. No.

28 Q. Were you able to see the cleat on the PIONEER?

29 A. No. With most boats, when you have a doublewide
30 barge, because of their size or horse power, you
31 make up the center of the barge [and cannot see the
32 mooring bit ties].

33 (Laremore Dep. 30:15-25, Jan, 31, 2012.)

34 Q. Is there any way you can monitor your bitt lines in
35 that configuration . . . from the wheelhouse?

36 A. No.

37 (Laremore Dep. 54:21-23.)

1 Defendants counter by arguing that the United States "has
2 utterly failed to provide any evidence of causation." (Defs.'
3 Opp'n at 17.) Defendants claim, and put forth evidence that,
4 hydrodynamic forces caused by the United States' chosen procedures
5 for filling the lock pool caused the flotilla's mooring lines to
6 part, which was the sole cause of the allision with the lock gate.
7 In support of their position, Defendants cite the computational
8 fluid dynamics ("CFD") analyses of the John Day Lock that was
9 conducted by naval architect John Waterhouse and his firm, Elliot
10 Bay Design Group. Mr. Waterhouse's declaration indicates the
11 following:

12 4. I oversaw the CFD Analyses. My firm employed
13 several industry standard computer programs during our
14 work. We modeled the geometry of the lock, the barge
15 flotilla, and the lateral pit where water enters the lock
16 when filling. This geometry was then transferred into our
17 CFI) program, StarCCM+ developed by CD Adaptco. This is
18 a mature software program that effectively divides the
19 fluid body into thousands of discrete cells. The program
20 can then calculate the fluid properties within each cell
21 for a given moment in time. Using an iterative process it
22 adjusts the flow and pressure values until the boundary
23 conditions are balanced for all of the cells for that
24 moment in time. The program then moves to the next moment
25 in time and repeats the process. By this means, we were
26 able to calculate the flow and pressure patterns within
27 the lock as it filled with water. At the time of the
28 allision between the barge flotilla and the upstream lock
gate, the Army Corps of Engineers was only using one
valve, thus feeding water into the south laterals only.
This filling pattern, combined with the geometry of the
barge flotilla, set up a resonant wave of low amplitude
within the lock.

5. Based on my evaluation of the data, I am
convinced that the resonant wave in the lock created
sufficient force on the vessels to part the mooring line.

6. The pressure fields as calculated by the CFD
program produced forces acting on the barge flotilla as
the resonant wave moved back and forth in the lock. The
mooring lines were thus subject to an oscillating load.
When the Army Corps of Engineers increased the flow into
the locks at approximately [halfway through the lockage

1 process], this resulted in higher forces on the mooring
2 lines and more energy in the resonant wave. This
increased energy caused the mooring lines to part.

3 7. The changing accelerations resulting from the
4 resonant wave were below the human detection threshold.
5 I would not expect a seaman standing on any of the
vessels in the lock to feel them.

6 (Waterhouse Decl. ¶¶ 4-7.)

7 In the court's view, the dispositive issue here is whether
8 there is a genuine issue of fact as to whether the United States
9 was the sole cause of damage caused at the John Day Dam on February
10 28, 2008. To begin, the court must dispose of a few arguments
11 raised by the United States. First, the United States claims it is
12 undisputed that Captain Laremore failed to constantly monitor the
13 position of the flotilla during the lockage.⁴ Viewing the evidence
14 in the light most favorable to Defendants, Captain Laremore may
15 have violated 33 C.F.R. §207.718 by failing to monitor his mooring
16 bit ties, but the record does not necessarily support the
17 conclusion that he violated the regulation by failing to monitor
18 the position of his vessels. Indeed, Captain Laremore indicates he
19 "monitor[ed] the position of the vessels in the lock as if we were
20 underway [in accordance with 33 C.F.R. § 207.718]," and he
21 "remained in the pilot house throughout the lockage, monitoring the
22 position of the tug, and attending to the log and data entry, just
23 as [he] would if the tug were underway." (Laremore Decl. ¶¶ 6-7.)

25
26 ⁴ In its opening memorandum, the United States stated, "[i]t
27 is undisputed that on the night of the allision, the Master of the
28 SUNDIAL, Capt. Steve Laremore, violated 33 C.F.R. § 207.718(k) and
(l), by not constantly monitoring the tug's position in the lock,
and by his failure to monitor his mooring bits ties." (Pl.'s Mem.
Supp. at 14) (emphasis added).

1 Second, the United States argues that the mooring lines used
2 the SUNDIAL's crew were defective:

3 The video should make short shrift of any argument that
4 excessive turbulence, or a surge within the lock, caused
5 the mooring lines securing the flotilla to part. A more
6 plausible explanation is that the lines used to moor the
7 flotilla were either simply in such bad shape that they
8 were not up to the task, or the vessels were not properly
9 tied-off.

10 (Pl.'s Mem. Supp. at 11.) No evidence in the record points to the
11 condition of the mooring lines as being defective. While it is
12 certainly logical to argue to a finder of fact that it is more
13 plausible to conclude that the mooring lines are defective than to
14 accept the theory espoused by the defendants' expert, that is
15 simply argument, and not a conclusion the court may reach on
16 summary judgment unless the court can say no reasonable juror could
17 adopt the theory of defendants' expert. Whatever my findings of
18 fact would be if I had that role in this case, I do not have it now
19 on summary judgment. Further, I cannot say no reasonable juror
20 could accept the defense experts' theory on the record before the
21 court now.

22 Third, and finally, the United States argues that Captain
23 Laremore's response to Mr. Boushey's warning calls was entirely
24 inadequate, which caused the barges to allide with the upstream
25 gate.⁵ The United States' argument flips the summary judgment

26 ⁵ "Despite two calls from the lock operator warning the
27 Master of the SUNDIAL that they were too close to the upstream
28 gate, and the lock operator's order to back up, no measures were
taken by the tug to reverse its course until it was too late. The
failure on the part of the tug's operator to take immediately
preventative measures after receiving the first call from the lock
operator caused the push knees of the grain barges to allide with
the upstream lock wall, causing the vessels to bounce back." (Pl.'s
Mem. Supp. at 2.)

1 standard on its head by taking the evidence in the light most
2 favorable to itself. The record suggests Mr. Boushey's attempts to
3 radio Captain Laremore, and Captain Laremore's response thereto,
4 occurred within a matter of seconds. And Captain Laremore
5 indicated he was "trying" to take preventative measure. In other
6 words, he was in process of doing so, but had to wait for the tug's
7 engine to come up to power since the throttle had been placed in
8 the neutral position in accordance with the John Day Navigation
9 Lock's Standing Operating Procedure. Mark Cline, who has operated
10 the SUNDIAL and is familiar with its ability to react to throttle
11 input, has stated: "I believe the tug would have required close to
12 a minute before the tug generated reverse thrust," and "it would
13 have taken at least another thirty seconds before the tow would
14 have reversed direction." (Cline Decl. ¶ 9.)

15 It is conceded that Captain Laremore could not see his mooring
16 bit ties, (Summ. J. Hr'g Tr. at 9, Dec. 5, 2012), which the United
17 States asserts is a violation of 33 C.F.R. §207.718. According to
18 the United States, the Fifth Circuit's decision in *United States v.*
19 *Tug Colette Malloy*, 507 F.2d 1019 (5th Cir. 1975), is "quite
20 instructive on the issue of how a vessel's violation of a federal
21 regulation negates the application of the sole cause defense under
22 the RHA." (Pl.'s Reply at 14.) In *Tug Colette*, it was admitted
23 that the barge struck and damaged the United States' floodgate. *Tug*
24 *Colette*, 507 F.2d at 1022. On appeal, the controversy stemmed

25 from the *trial court's findings of fact* that neither the
26 failure to give fog or sound signals [as required under
27 C.F.R. 207.180(d)(2),] nor the lack of effective
28 communication between lookout and wheelhouse contributed
to the collision and that the sole cause of the accident
was the [United States'] gateman's failure to open the
floodgates earlier.

1 *Id.* (emphasis added). The Fifth Circuit in *Tug Colette* deemed the
2 trial court's findings clearly erroneous, stating:

3 It is true that the west gateman heard by radio that the
4 east gateman had allowed the tug and barge to pass
5 through the east gates and enter the river. This was
6 some notice of the approach of the vessels. It is also
7 true, however, that had the Tug COLETTE MALLOY complied
8 with the duty imposed by 33 C.F.R. 207.180(d)(2) by
9 giving the requisite sound signals and waiting for the
10 answering signals of the gateman no collision would have
11 occurred. This omission contributed to the accident.
12 Similarly, fog signals sounded during the river crossing
13 would have alerted the gateman that the tug was near. The
14 gateman, aided by these signals, could have accurately
15 judged just when the gates should have been opened,
16 keeping river debris out of the canal in the interim.
17 Finally, if the tug's captain had been apprised that the
18 gates were closed immediately as that fact became known
19 to the lookout, the accident might have been
20 averted. . . . [Thus,] the vessels are . . . liable under
21 the [RHA] -- but for the reason that as a matter of fact
22 and law the United States was not solely at fault in
23 causing the accident.

24 *Id.* at 1023 (emphasis added).

25 For two reasons, the United States' reliance on *Tug Colette* is
26 unpersuasive. First, *Tug Colette* supports the proposition that the
27 violation of a federal regulation can negate a sole cause defense.
28 But that is not always necessarily so. As *Tug Colette* held, the
violation of the regulation must have "contributed to the
accident." That factual determination should be left for trial.
Second, it appears the Fifth Circuit reviewed the district court's
findings of fact after a court trial. At this stage, this court
cannot make findings of fact. Instead, the court must determine
whether there is an issue of fact regarding Defendants' sole cause
defense. Without out the benefit of being able to evaluate witness
credibility or seeing Defendants' theory subjected to the test of
cross-examination, the court cannot say that no reasonable trier of
fact could conclude that the United States was solely at fault when

1 viewing the evidence in the light most favorable to Defendants.
2 Accordingly, the court recommends denying the United States' motion
3 for summary judgment on the issue of liability.⁶

4 Lastly, I will address the United States' claim that it is
5 entitled to summary judgment on the issue of damages. The Eighth
6 Circuit's decision in *United States v. Capital Sand Co., Inc.*, 466
7 F.3d 655 (8th Cir. 2006), is instructive on this issue. There, the
8 court recognized that admiralty cases only require the United
9 States "to prove that the amount claimed as damages, including
10 overhead is a fair and reasonable charge for the repairs and
11 necessary to complete the job." *Id.* at 658 (citation and internal
12 quotation marks omitted).

13 Defendants oppose the United States' motion for summary
14 judgment on the issue of damages on the grounds that (1) the United
15 States' counsel failed to confer regarding a motion for summary
16 judgment as to damages; rather, the United States' counsel only
17 conferred as to the liability motion; (2) the United States has not
18 demonstrated that each charge was reasonable and necessary; (3) the
19 United States' "claim for almost \$25,000,000 in penalties would
20 remain outstanding even if the Court granted the summary judgment
21 now sought," (Defs.' Opp'n at 6); and (4) the United States fails
22 to address Defendants' limitations defense which would limit the
23 United States' recovery to the SUNDIAL's post-accident value of
24 \$2,500,000.00.

26
27 ⁶ Because of this disposition, the court need not address
28 Defendants argument that the United States' alleged "[s]poliation
of [e]vidence, alone, should prevent the summary judgment it seeks"
on the issue of liability. (Defs' Opp'n at 23.)

1 In a footnote in his reply brief, the United States' counsel
2 claims Defendants' conferral argument "is quite disingenuous in
3 light of the fact that the Government has on numerous occasions
4 advised Defendants that it planned on moving for summary judgment
5 on both liability and damages." (Pl.'s Reply at 25 n.25.) He goes
6 on to explain that, "given Defendants' refusal to admit liability,
7 a denial of damages is implicit." (*Id.*)

8 Considering it is far from uncommon for a party to move for
9 partial summary judgment on liability, and leave open for trial the
10 question of damages, the court considers counsel's explanation
11 entirely inadequate. This is not the first time counsel has been
12 admonished for failure to comply with the Local Rules.
13 Unfortunately, the court feels compelled to remind counsel, once
14 again, that the court may deny any motion that fails to meet Local
15 Rule 7-1(a)'s certification requirement. The court will not do so
16 here because this is a Findings and Recommendation and the court
17 wishes to facilitate a decision on the merits. However, the court
18 cautions counsel that further failure to comply fully with the
19 Local Rules will not be tolerated.

20 The United States has, in essence, moved for partial summary
21 judgment on damages, arguing that the \$4,867,320.43 in costs
22 incurred to repair the upstream gate of the John Day Navigation
23 Lock was "a fair and reasonable charge for the repairs and
24 necessary to complete the job." *Capital Sand*, 466 F.3d at 658. The
25 United States did not move for summary judgment on Defendants'
26 limitation defense or its claim for civil penalties under § 411.
27 (See Pl.'s Mem. Supp. at 22-23.)

Donald Erickson, the project manager for the Columbia River projects for the United States Corps of Engineers, has provided a detail sheet describing the extent and cost of the repairs incurred as a result of the allision on February 28, 2008. (Erickson Decl. ¶¶ 3-39, Ex. A.) John Murdoch, a marine surveyor retained by Defendants to assess the damage at the John Day Navigation Lock, estimated that repairs would cost \$5,000,000.00. (Kaufman-Cohen Decl. Ex. H at 4.) In the court's view, Murdoch's estimate supports the conclusion that the United States' costs were fair and reasonable and necessary to complete the job.

Defendants only take two specific exceptions to Erickson's detail sheet and description of the cost of the repairs incurred. First, Defendants argue that the United States does not explain how its floating bulkhead contract swelled from an initial estimated amount of \$856,440.00 to a total of \$1,518,576.67. The court disagrees. A review of paragraphs 19-21 of Erickson's declaration indicates that the contract was "for an initial amount of \$856,440.00 and performance period of 130 days," but "[o]ptions were exercised in the contract to extend the performance period up to the time of the navigation lock closure for repairs" which increased the total to \$1,518.576.67. (Erickson Decl. ¶¶ 19-21.)

Second, Defendants argue that the United States has failed to present evidence that its "'report writing' and various other administrative expenses were reasonable." (Defs.' Opp'n at 27.) Presumably, Defendants are referring to the first item on the detail sheet provided by Erickson, which is entitled "Letter Report, Plans/Specs, and Project Management Plan." (Erickson Decl. Ex. A.) In his declaration, Erickson explained that the "total

1 cost for the Letter Report, Contract Documents, and Project
2 Management Plan was \$246,415.60; \$237,771.10 for labor costs and
3 \$8,644.50 for a survey of the gate, travel to and from the accident
4 and storage site, Computer Aided Design & Drafting (CADD) services,
5 and reproduction of contract drawings." (Erickson Decl. ¶ 5.)
6 According to Erickson, these costs lead to the completion of the
7 following tasks:

- 8 • A thorough inspection and documentation of the condition of
9 the gate, counterweights, gate machinery, and infrastructure
10 (i.e., hatches, pedestals, hand rails, gratings, etc.) and
11 related structural, mechanical, and electrical components of
12 the gate system.
- 13 • Determination as to immediate repairs required, including
14 repair or replacement of the gate, counterweights, gate
15 guides, wire ropes, and other structural, mechanical and
16 electrical systems.
- 17 • Recommendations as to what actions would be required to
18 operate the Navigation Lock until repairs could be made.
- 19 • Design and engineering analysis required for the contract
20 documents (plans/specs) that specified the type and sequence
21 of repairs required to repair the gate based on the Letter
22 Report.
- 23 • Preparation of a Project Management Plan that established
24 scope, schedule, budgets, and technical performance
25 requirements for the management and control of the project
26 from planning, engineering, and design through construction.

27 (Erickson Decl. ¶ 4.)
28

1 In short, Defendants have not pointed to any facts that
2 convince the court there is a genuine issue for trial as to whether
3 the United States' \$4,867,320.43 in costs were a fair and
4 reasonable charge for the repairs and necessary to complete the
5 job.

6 **CONCLUSION**

7 Consistent with the discussion above, the United States'
8 motion (Docket No. 89) for summary judgment should be GRANTED in
9 part and DENIED in part.

10 **SCHEDULING ORDER**

11 The Findings and Recommendation will be referred to a district
12 judge. Objections, if any, are due **March 6, 2013**. If no
13 objections are filed, then the Findings and Recommendation will go
14 under advisement on that date. If objections are filed, then a
15 response is due **March 25, 2013**. When the response is due or filed,
16 whichever date is earlier, the Findings and Recommendation will go
17 under advisement.

18 Dated this 15th day of February, 2013.

19 /s/ Dennis J. Hubel

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21 DENNIS J. HUBEL
22 United States Magistrate Judge
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